Congress of the United States
Washington, DC 20515

December 13, 2021

Martin J. Walsh
Secretary
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Secretary Walsh,

We write in strong support of the Department of Labor's (DOL) recently proposed rule[1] regarding both environmental, social, and governance (ESG) investing and Economically Targeted Investments (ETIs). The proposed rule restores the recognition that consideration of both these principles is an appropriate and, today, even routine part of the investing process that provides workers and private groups the ability to invest based on their individualized preferences and priorities.

By both correctly noting that certain ESG factors are material and thus can be considered when making an investment decision and that non-material ESG factors are subject to the "tie-breaker"[2] standards from previous department guidance, DOL is ending the chilling effect caused by the previous rule and removing unnecessary and burdensome obstacles to regulate sustainable investing prudently.

ESG investing is growing tremendously, breaking records year after year. In 2020, "for the fifth calendar year in a row, sustainable funds set an annual record [with] net flows reach[ing] $51.1 billion."[3] This growth is the result of greater interest in sustainable investing, especially among young workers who increasingly want to make personalized decisions when investing for their futures. Those seeking sustainable investing opportunities did not see lower returns overall. After looking at 3,000 US mutual funds and exchange-traded funds (ETFs), the Morgan Stanley Institute for Sustainable Investing found that ESG equity funds outperformed traditional non-ESG funds by a median total return of 4.3 percentage points in 2020.[4] Meanwhile, Morningstar similarly found that ESG-based funds outperformed conventional funds in 2020.[5]

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[1] https://www.federalregister.gov/documents/2021/10/14/2021-22263/prudence-and-loyalty-in-selecting-plan-investments-and-exercising-shareholder-rights#print

[2] https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf (p. 7)

[3] Jon Hale, *U.S. Sustainable Funds Continued to Break Records in 2020*, Morningstar (February 25, 2021); available at: https://www.morningstar.com/articles/1026261/us-sustainable-funds-continued-to-break-records-in-2020

[4] https://www.morganstanley.com/ideas/esg-funds-outperform-peers-coronavirus

[5] https://www.morningstar.com/content/dam/marketing/shared/pdfs/Research/Sustainable_Funds_Landscape_2021.pdf?utm_source=eloqua&utm_medium=email&utm_campaign=none&utm_content=27482

The proposed rule stands in contrast to the myopic and shortsighted rule promulgated in 2020: *Financial Factors in Selecting Plan Investments*[6], an overreaching regulation designed to curtail significantly this growth in sustainable investing for entities governed by the Employee Retirement Income Security Act (ERISA). The current proposal better reflects the needs of today's landscape of sustainable investing.

While we want to see the proposed rule enacted as soon as possible, we recommend three additions to the final published rule. First, we believe the rule's examples should be modified to further the spirit and scope of the regulations. Paragraph (b)(4) of the draft rule mentions several factors a "prudent fiduciary may consider [as] material to the risk-return analysis."[7] These include "climate-change factors," "governance factors," and "workforce practices."[8] But this framing is needlessly narrow, even as examples, and fails to capture the full range of ESG factors that can and should be considered by fiduciaries to determine if the factors are financially material or can be used as tie-breakers among comparable investments. In reality, environmental considerations not directly related to climate change, tax avoidance, issues of supply chain procurement, and workforce issues dealing with the ability of workers to bargain collectively -- to name a few -- should also be considered material. A more inclusive list incorporated into the regulation is important to give ERISA fiduciaries clearer guidance and greater confidence in applying these considerations. The final rule should reflect this or otherwise disclaim that the examples cited are not all-inclusive.

Second, ETIs should be expressly and separately identified as permissible, assuming they are equal to or better than comparable available investments in meeting the portfolio needs of the plan. ETIs overlap with investments applying ESG considerations, but they are not the same. ETIs are typically private investments that create local jobs, advance community economic development, and often involve construction of much-needed affordable and workforce housing. ETIs have a long history; they were expressly allowed in tie-breaker situations in DOL guidance issued in 1994[9], before the ESG nomenclature was widely used, and were referenced positively again in guidance issued in 2015.[10] They have formed the backbone of responsible pension investment by union pension plans for the past three decades.

Third, there should be clearer recognition that retirement and benefit plans typically have very long-term funding obligations, and pension fiduciaries should be encouraged and supported in moving beyond the short-term thinking typical of standard investment analysis. Applying a long-term frame to investment analysis makes considerations of climate change, workforce investment, and other ESG factors more clearly relevant to investment decision-making. Expressly calling out the appropriateness of such a long-term frame in the regulations would be supportive of fiduciaries who incorporate these considerations in their decision-making and consider the long-term benefits for the workers and plans they're serving.

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[6] https://www.govinfo.gov/content/pkg/FR-2020-11-13/pdf/2020-24515.pdf
[7] https://www.govinfo.gov/content/pkg/FR-2021-10-14/pdf/2021-22263.pdf (p. 31)
[8] *Id* (p. 31-32)
[9] DOL Interpretive Bulletin 94-01
[10] DOL Interpretive Bulletin 2015-01

Sustainable and social investing is growing fast in the United States and peer nations. Through the application of ESG factors and ETIs, investors have been able to invest according to their values, bring about positive change, and generate as good or better returns on investment compared to traditional investing methods. Regulations governing sustainable investing should reflect this reality instead of trying to stifle it for ideological reasons, as the 2020 rule did. We reiterate our strong support for this rule and encourage the Administration to promulgate it with our proposed changes. We look forward to working with DOL to strengthen ERISA plans further and provide workers more investment options that align with their long-term interests.

Sincerely,

Andy Levin
Member of Congress

Cindy Axne
Member of Congress

Suzan DelBene
Member of Congress

Jesús G. "Chuy" García
Member of Congress

/s/ Jimmy Panetta
Member of Congress

/s/ Donald S. Beyer Jr.
Member of Congress

/s/ Mondaire Jones
Member of Congress

/s/ Alexandria Ocasio-Cortez
Member of Congress

/s/ Adam Smith
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/s/ Susan Wild
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/s/ Rashida Tlaib
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